

**STATE OF WISCONSIN  
Department of Commerce**

*In the Matter of the PECFA Appeal of*

Krist Atanasoff  
Krist Oil Co  
303 Selden Rd  
Iron River MI 49935-1899

PECFA Claim 54956-4635-05  
Hearing #97-78

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**Final Decision**

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**P R E L I M I N A R Y   R E C I T A L S**

Pursuant to a petition for hearing filed June 11, 1997, under §101.02(6)(e), Wis. Stats., and §ILHR 47.53, Wis. Adm. Code, to review a decision by the Department of Industry, Labor and Human Relations, now Department of Commerce, a hearing was commenced on March 24, 1998, at Madison, Wisconsin. A proposed decision was issued on May 29, 1998, and the parties were provided a period of twenty (20) days to file objections.

The issue for determination is:

Whether the department's decision dated May 22, 1997 denying reimbursement from the Petroleum Environmental Cleanup Fund Act (PECFA) program in the amount of \$3,026.00 was incorrect.

There appeared in this matter the following persons:

**PARTIES IN INTEREST:**

Krist Atanasoff  
Krist Oil Co  
303 Selden Rd  
Iron River MI 49935-1899

By: In Person  
Department of Commerce  
PECFA Bureau  
201 West Washington Avenue  
PO Box 7838  
Madison WI 53707-7838

By: Kelly Cochrane, Assistant Legal Counsel

Department of Commerce  
201 W. Washington Ave., Rm. 623  
PO Box 7838  
Madison WI 53707-7838

The authority to issue a final decision in this matter has been delegated to the undersigned Terry W. Grosenheider, Executive Assistant, by order of the Secretary dated May 25, 1999, a copy of which is attached to this Final Decision.

The matter now being ready for decision, I hereby issue the following

#### FINDINGS OF FACT

The Findings of Fact in the Proposed Decision dated May 29, 1998 are hereby adopted for purposes of this Final Decision.

#### CONCLUSIONS OF LAW

The Conclusions of Law in the Proposed Decision dated May 29, 1998 are hereby adopted for purposes of this Final Decision.

#### DISCUSSION

The Discussion in the Proposed Decision dated May 29, 1998 is hereby adopted for purposes of this Final Decision.

#### FINAL DECISION

The Proposed Decision dated May 29, 1998 is hereby adopted as the Final Decision of the department.

#### NOTICE TO PARTIES

##### Request for Rehearing

This is a final agency decision under §227.48, Stats. If you believe this decision is based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send a written request to Department of Commerce, Office of Legal Counsel, 201 W. Washington Avenue, 6' Floor, PO Box 7970, Madison, WI 53707-7970.

Send a copy of your request for a new hearing to all the other parties named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the hearing examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after the mailing, date of this decision as indicated below. Late requests cannot be granted. The process for asking for a new hearing is in Sec. 227.49 of the state statutes

Petition For Judicial Review

Petitions for judicial review must be filed no more than 30 days after the mailing, date of this hearing decision as indicated below (or 30 days after a denial of rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, Department of Commerce, Office of the Secretary, 201 W. Washington Avenue, 6' Floor, PO Box 7970, Madison, WI 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" and counsel named in this decision. The process for judicial review is described in Sec. 227.53 of the statutes.  
Dated: May 26, 1999

Terry W. Grosenheider  
Executive Assistant  
Department of Commerce  
PO Box 7970  
Madison WI 53707-7970

cc: Krist Atanasoff  
Kelly Cochrane, Assistant Legal Counsel, Wisconsin Department of Commerce  
Dispute Resolution Coordinator, PECFA

Date Mailed: 5/28/99

Mailed By: Tabitha A. Behling

Amended Mailing Date: 6/2/99

Mailed by: Ellen Houd

**STATE OF WISCONSIN**

**DEPARTMENT OF COMMERCE**

IN THE MATTER OF: The claim for  
reimbursement under the PECFA  
Program by

MADISON HEARING OFFICE  
1801 Aberg Ave., Suite A  
P.O. Box 7975  
Madison, WI 53707-7975  
Telephone: (608) 242-4818  
Fax: (608)242-4813

Krist Atanasoff

**Hearing Number:** 97-78  
**Re: PECFA Claim** 54956-4365-05

**PROPOSED HEARING OFFICER DECISION**

**NOTICE OF RIGHTS**

Attached are the Proposed Findings of Fact, Conclusions of Law, and Order in the above-stated matter. Any party aggrieved by the proposed decision must file written objections to the findings of fact, conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to: Madison Hearing Office, P.O. Box 7975, Madison, WI 53707-7975. After the objection period, the hearing record will be provided to Christopher Mohrman, Deputy Secretary of the Department of Commerce, who is the individual designated to make the FINAL Decision of the department in this matter.

STATE HEARING OFFICER:  
James H. Moe

DATED AND MAILED:  
May 29, 1998

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**MAILED TO:**

Appellant Agent or Attorney

Department of Commerce

Ray de Long  
4080 North 20th Avenue  
Wausau, WI 54401

Kelly Cochrane  
Assistant Legal Counsel  
P.O. Box 7970  
Madison, WI 53707-7970

c: Krist Atanasoff  
Krist Oil Co  
303 Seldon Road  
Iron River, MI 49935-1899

**STATE OF WISCONSIN**

## **DEPARTMENT OF WORKFORCE DEVELOPMENT**

### **In the matter of the REQUEST FOR REIMBURSEMENT PURSUANT TO THE PROVISIONS OF THE PECFA PROGRAM**

**Hearing Number: 97-78  
PECFA Claim Number: 54956-4635-05**

**KRIST ATANASOFF, KRIST OIL CO., APPELLANT**

**WISCONSIN DEPARTMENT OF COMMERCE, RESPONDENT**

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### **PROPOSED DECISION**

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A decision was issued on May 22, 1997, by the Department of Commerce allowing payment of PECFA reimbursement with regard to a property owned by Krist Atanasoff, Krist Oil Co. Of the entire Reimbursement sought, amounts totalling \$3,026 were disallowed. A timely appeal was filed from that denial, and a hearing was held on March 24, 1998 with regard to the propriety of the department's decision denying that payment.

The Secretary of the Department of Commerce delegated administrative law judge James H. Moe, of the Wisconsin Department of Workforce Development, to hear the appeal.

Based on the applicable records and evidence in this case, including the testimony given at the March 24, 1998, hearing, the state hearing officer makes the following

#### **PROPOSED FINDINGS OF FACT**

1. The appellant, through its consultant, Remedial Engineering, Inc. (hereinafter REI), submitted a claim for reimbursement under the Petroleum Environmental Cleanup Act (hereinafter PECFA) program in the amount of \$374,753.80. That claim was received by the Department of Commerce (hereinafter, the department, on April 2, 1996.
2. As part of the claim submitted, REI included a Form 2b, used to document that compliance with the Chapter DWD 47 requirement that at least three bids are considered before selecting a commodity service provider. On that form, the REI listed the three bids obtained for recovery well installation and, indicated that it had selected other than the lowest cost service provider.
3. REI's contracts with the appellant require it to solicit competitive bids for commodity services and to utilize the lowest competitive bid for each service.
4. REI failed to select the lowest cost service provider because the lowest cost service provider had performed previous drilling activities under REI's supervision and took too long to complete the activities. REI concluded that by awarding the recovery well installation to other than the lowest cost service provider would save money.

5. The department's stated basis in its May 22, 1997 decision for the denial of costs totalling \$3026 was that three like bids were not obtained.

### **APPLICABLE LAW**

Chapter ILHR 47.01 of the Wisconsin Administrative Code provides, in relevant part, as follows:

(3) Intent of PECFA....(b) The responsible party shall be the primary point for the control of costs within the PECFA program. The focus of the program will be to maintain the responsible party as the central control point throughout the claim process.

Chapter ILHR 47.33 of the Wisconsin Administrative Code provides, in relevant part, as follows:

(b) *Commodity purchases.* 1. All commodity services which include, but are not limited to, soil borings, monitoring-well construction, laboratory analysis, excavation and trucking shall be obtained through a competitive bid process. A minimum of three bids are required to be obtained and the lowest cost service provider shall be selected...

4. An owner or operator may appeal to the department to obtain approval to select other than the lowest cost commodity service provider. The department may approve an appeal if it determines that the use of another service provider will further the goals of the program.

### **PROPOSED DISCUSSION AND CONCLUSIONS OF LAW**

Although the department initially denied reimbursement on the basis that three like bids were not obtained, the record in this matter shows that three like bids were obtained by REI for installation of the recovery well. The issue, however, remains whether those costs of \$3026 are reimbursable under the PECFA program.

The department contends that these costs should be denied pursuant to ILHR 47.33(b) of the Administrative Code because the lowest cost service provider was not selected. The appellant concedes that other than the lowest cost service provider was selected, but contends that such costs are properly reimbursable because they were not for commodity services or, if they were, that selection of other than the lowest cost service provider saved the program money.

REI initially reported the costs at issue here, on the form used to report commodity services. If the recovery well installation was not a commodity service, as the appellant now claims, there was no reason to report it on that form. Moreover, the project manager testified that he considered the installation of the recovery well to be, at least in part, a commodity service. All of these circumstances persuade the appeal tribunal that the installation of the recovery well constituted a commodity service subject to the provisions of Chapter DWD 47.33 of the administrative code.

The appellant argues that Chapter DWD 47.33(1)(b)4, which permits a party to appeal to the department to obtain approval "to select other than the lowest cost commodity service provider", is applicable in this instance. However, the plain language of the rule leads to the conclusion that such an appeal must take place before any selection occurs. The appellant had no such contact with the department prior to making its selection.

The appellant further asserted that its selection of other than the lowest cost service provider in this instance furthered the goals of the program pursuant to Chapter DWD 47.01(3)(h) of the administrative code. That section provides that the responsible party is the primary point for controlling costs within the program. However, the responsible party does not have unlimited discretion. The code specifically requires responsible parties to solicit competitive bids for commodity services and to utilize the lowest competitive bid.

The consultant concluded that there were difficult drilling conditions at the site. From its prior experience with the lowest bidder, the consultant concluded that selection of the lowest bidder would result in delays and additional costs, which it believed would be more than offset by making the selection it did. However, the appellant has failed to demonstrate that its selection actually resulted in any cost savings. Moreover, there has been no showing why the appellant failed to contact the department prior to making its selection to explain its reasoning, and request permission for its choice.

The state hearing officer therefore finds that the Department's decision in denying reimbursement of costs totaling \$3026 was correct, because the lowest cost service provider was not selected, within the meaning of DWD 47.33 of the administrative code.

#### **PROPOSED DECISION**

The department's decision to deny costs of \$3026 is modified to reflect the correct basis for the denial and, as modified, is affirmed.

James H. Moe  
State Hearing Officer

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